Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

NOTICE OF PROPOSED RULEMAKING

COMMENTS OF THE
COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION (COMPTIA)

Introduction

On behalf of the Computing Technology Industry Association (CompTIA), we thank you for looking at the important issue of preserving the open Internet / broadband deployment. Undeniably, the Internet has changed the way Americans of all stripes live and prosper in our society. In the space of a decade, broadband has now become the primary way in which we connect to the Internet, with approximately half of all Americans using or subscribing to such offerings through a wide array of providers. This growth and innovation – at the core and at the edges – evolves daily. We are committed to working with the Commission, policymakers and our members to help this innovation only proliferate.

CompTIA's members sit at the forefront of the Internet revolution. From creating the products and services that underpin the broadband Internet, to helping small businesses and homes get wired with broadband, we feel we have a good perspective for the current inquiry. This experience has led us to believe that a main ingredient in the Internet's success can be traced to something that hasn't really occurred – that is, the medium has escaped heavy, direct regulation.

To be sure, a lot of the underlying telecommunications infrastructure which supports the Internet sees regulation. Yet, for the most part, broadband Internet / information services themselves have avoided onerous common carrier / POTs-like rules. This absence has in turn fostered immense competition and innovation. And, that has brought about great commercial, consumer and societal benefit.

Ready access to broadband-driven content, applications, services and devices plays an integral role in this growth. In particular, it has allowed the bulk of our membership – i.e., small, value-added-resellers of IT (VARs) – to deliver productivity-enhancing, IT solutions to millions of American small businesses and households. Having competitive broadband choices ensures that this essential work goes forward.

To this end, CompTIA believes that the market does not now warrant new detailed rules to further broadband access and deployment. That noted, should the Commission determine after receiving comment that it needs broad rules as noticed within this NPRM, we respectfully urge it do three things: 1. codify its present Net Neutrality rules to police, on a case-by-case basis, market abuse; 2. if / when the FCC uses these rules, they should be primarily employed to address clear cases of market breakdown / consumer harm / "unreasonable" marketplace behavior; and 3. any such rules should allow for a maximum of flexibility as to service and business model experimentation, especially as they relate to enterprises providing core, facilities-based technologies – i.e., landline, satellite, BPL, and wireless (among other known technologies) – to third-parties.

Background

CompTIA is the leading voice of the world's $3 trillion information technology industry. CompTIA's membership extends into more than 100 countries and includes companies at the forefront of innovation; including, the channel partners and solution providers they rely on to bring their products to market, and the professionals responsible for maximizing the benefits organizations receive from their technology investments. The promotion of policies that enhance growth and competition within the computing world

is central to CompTIA's core functions. Further, CompTIA's mission is to facilitate the development of vendor-neutral standards in e-commerce, customer service, workforce development, and IT workforce certification.

CompTIA's members include thousands of small computer services businesses called VARs, as well as nearly every major computer hardware manufacturer, software publisher and services provider. Our membership also includes thousands of individuals who are members of our "IT Pro" and our "TechVoice" groups, proudly representing the American IT worker who relies on IT to enhance the lives and productivity of our nation.

Argument

I. The Marketplace Thrives without Detailed Rules or Regulations

In the present NPRM, the FCC seeks to preserve "a free and open Internet, however it is accessed," by codifying its four previous "Net Neutrality" principles – e.g., consumers are entitled to: access lawful Internet content of their choice; run applications and use services of their choice; connect their choice of legal devices that do not harm the network; and competition among network providers, application and service providers, and content providers.[1]

The Commission also seeks to codify two new principles – e.g., rules that require all broadband Internet access service providers to treat lawful content, applications, and services in a "non-discriminatory" manner;[2] and rules requiring any broadband Internet access service provider to disclose such information

[1] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, para. 11 (*NPRM*).
[2] *Id.* at para. 104.

concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in the rulemaking.[3]

According to the FCC's NPRM, the proposed rules would be subject to "reasonable network management" practices, with the Commission additionally proposing some added flexibility, allowing for "managed" or "specialized" service arrangements for use by Internet access providers, consistent with the proposed rules.[4]

Among other things, the FCC seeks primarily to justify its rules by a small number of past incidents – essentially two – in which two, separate Internet access providers ostensibly interfered or discriminated against certain types of Internet traffic.[5] Accordingly, the FCC believes the potential for harm remains too great, thus demanding the prophylaxis of its six proposed rules.

At a threshold level, we do not see this same need. This is not to say that government regulation is never warranted, or always unnecessary. Like the Commission, we believe that their six principles are important. They promote a "free and open Internet." Differing with the Commission, however, we believe that the competitive broadband marketplace by and large protects the *public interest* without need for detailed government mandate or regulation.

CompTIA has long-held that for fast-moving technology markets, such as in the broadband space, the evolution of technology, marketplace guidance, industry best practices, consumer education and current

[3] *Id.* at para. 119.
[4] *Id.* at para. 108.
[5] *See Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (EB 2005)*; see also Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast Network Management Practices Order*).

enforcement authority remain far more preferable, and stand a much better chance of yielding positive market and societal benefits, than do detailed government regulations. As we have noted above, we see the FCC's Net Neutrality principles, as well as its two newly proposed rules, already working in the marketplace. Consequently, consumers have a blinding array of choices among content, applications, devices, services and providers; and the market only appears to be providing more with each day.

The FCC's data confirms this; America has:

- 132 million subscribing to broadband – 63% of all American adults, and 130 million more than 10 years ago
- 87% of zip codes with 5 or more providers, with every U.S. zip code having at least 1 broadband provider
- Broadband services delivered by –
    - 863 ADSL providers
    - 238 SDSL providers
    - 259 traditional wire line providers
    - 296 cable modem providers
    - 308 fiber providers
    - 4 satellite providers
    - 6 powerline providers
    - 505 fixed wireless providers
    - 24 mobile wireless providers
- 31% of all adults with wireless smart phones, up from just 1% in 2003[6]

[6] More recent data conducted by Nielsen shows that 160.3 million (or 93% of the "195 million active Web users in the U.S.") access the Internet through broadband connections, a 16% increase over 2008 figures. *See* Don Reisinger, *Nielsen: Broadband use up, users more social*, CNET News, The Digital Home, (January 6, 2010), http://news.cnet.com/8301-13506_3-10427028-17.html.

Our members have benefitted as a result. For our very largest members, the Internet economy – built on their infrastructure, software, hardware, content, devices and services – represents hundreds-of-billions of dollars yearly in business. Importantly, growing core innovation / network development has created a powerful symbiosis with edge innovators, engendering an onslaught of near-daily technological breakthroughs for consumers and businesses.[7]

These benefits extend to our smallest members, too. Not only has the Internet "flattened" competition, allowing the smallest of companies to compete globally, broadband has also helped create whole new categories of competition, in which our smallest members thrive. To briefly illustrate, "remote" service models – such as "Cloud Computing" / Managed Services / Software as a Service (SaaS), Network Attached Storage, Network Security, among others – now represent a mainstay revenue generator for the majority of our small, solution provider / VAR members. Affordable broadband options are essential inputs toward making these models work; without acceptable broadband options, this $20 billion slice of the industry could not have even gotten off the ground, let alone remain viable and grow. Like the spread of broadband technologies, we see no signs of this abating, even in light of the current economic turmoil.

There's no secret to the market's vibrancy. As noted by FCC Commissioner Robert McDowell:

> *"Since the early days of the state-run ARPANET, network management and Internet governance initiatives have migrated further away from government regulation, not closer to it. This*

[7] *See, e.g.*, Chris Nuttall, *Internet-enabled TVs to feature 'app-stores'*, FT.Com, (January 7, 2010), http://www.ft.com/cms/s/0/d5015ae0-fb03-11de-94d8-00144feab49a.html; *see also* Jessica E. Vascellaro and Niraj Sheth, *Google Opens New Front in Smart Phone Battle*, Wall Street Journal, (January 6, 2010), http://online.wsj.com/article/SB10001424052748703436504574639992298645658.html; see also Holman W. Jenkins, *The Future on TV*, Wall Street Journal (January 5, 2010), http://online.wsj.com/article/SB10001424052748703436504574640181596802504.html.

evolution away from government intervention has been the most important ingredient in the Internet's success."[8]

That success still evolves, with much more still to happen. Accordingly, we urge continued reliance on the present model of "light touch" oversight – the market works, providing immense social and commercial benefit without potentially distorting government rule.

II. Murky Statutory Authority Calls for Regulatory Caution

The FCC's initial Net Neutrality principles, first issued by the Commission in 2005, are just that, principles. FCC policy, guided by the Administrative Procedure Act (APA), likely means that the present Net Neutrality principles affect no prospective legal rights on their own.[9] Through this NPRM, the FCC seeks to codify, or give legal force to, the four previous Net Neutrality principles, plus two new principles.

Comporting the agency's practices with the APA – i.e., giving proper "notice and comment" to market participants and consumers – is a necessary step to give the principles the weight of law. But, apart from aligning agency practice with the APA, a rub remains. Internet access services are classified as information services, not telecommunications / "Title II" common carrier services.[10] Thus, Internet access services remain essentially (though not entirely) unregulated by the Commission – this treatment

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[8] *See* Statement of Commissioner Robert M. McDowell, Concurring in Part, Dissenting in Part, *NPRM* at pg. 96.

[9] This remains an open question, with a related decision in *Comcast Corp. v. FCC* imminent from the U.S. Court of Appeals, DC Circuit; *see also* Joelle Tessler, *Comcast, FCC take net neutrality dispute to court,* AP (January 8, 2010), http://news.yahoo.com/s/ap/20100108/ap_on_hi_te/us_tec_comcast_fcc_internet_rules;_ylt=AlR_SWloRWkp9FZ.Xkp5oJ0jtBAF;_ylu=X3oDMTMyZjlxbTVtBGFzc2V0A2FwLzIwMTAwMTA4L3VzX3RlY19jb21jYXN0X2ZjY19pbnRlcm5ldF9ydWxlcwRjcG9zAzEEcG9zAzIEc2VjA3luX3RvcF9zdG9yeQRzbGsDY29tY2FzdGZjY3Rh; *see also* Kenneth Corbin, *Why Comcast will win the Net neutrality battle,* Internetnews.com (January 11, 2010), http://blog.internetnews.com/kcorbin/2010/01/why-comcast-will-win-the-net-n.html .

[10] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 153(44) ("...A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services…").

hemmed in by past FCC orders; themselves given force through the Communications Act, and reaffirmed by Federal Court / Supreme Court rulings.[11]

It is true that the Commission relies on its so-called "ancillary jurisdiction" – i.e., non-specific authority to advance the general intent of the Communications Act – to minimally regulate information services.[12] We believe that some of this regulation is warranted and indeed necessary to promote the *public interest*. However, going beyond that raises serious issues of statutory authority.[13] Commissioner Robert McDowell points this out by noting, "*The Commission simply cannot use the generalized provisions of Title I [of the Communications Act] to impose more onerous regulations on providers of broadband Internet access service than it is authorized to impose on common carriers under the specific provisions of Title II*."[14]

[11] *See Inquiry Concerning High- Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[12] *See, e.g., IP-Enabled Services, WC Docket No. 04-36, E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116,* para. 29 *(rel. June 3, 2005),* wherein the Commission, through, among other authority, used its "ancillary jurisdiction" to require provision of E-911 services for "interconnected" VoIP providers.

[13] *Id.,* "ancillary jurisdiction" has also been used by the FCC to guarantee access by non-affiliated, third-parties to monopoly, incumbent telecom facilities for the provision of "enhanced services" during the FCC's "Computer Inquiries". That noted, though "ancillary jurisdiction" remains a flexible regulatory tool, it should be employed in context to the surrounding technology / marketplace / times. The market now is fundamentally different than before the breakup of "Ma Bell" when the FCC used "ancillary jurisdiction" to prevent monopoly encroachment on the then nascent enhanced / information services market. All deference aside, such similar use now seems expansive when viewed with the lens of present market realities.

[14] *See NPRM* at pg. 98.

Stated more simply, the general sections of the Communications Act should not be read to give more authority over market participants than the Commission might presently possess.

In this regard, some of our members see in this NPRM the potential for onerous regulations, which bear the hallmarks of "Title II" / 20th Century telephone regulation. In their view, Net Neutrality mandates are close policy substitutes to telephone "open access" rules[15] in that, like the latter, the former can easily be tailored to mandate access by non-affiliated third-parties to the infrastructure of facilities-based broadband providers.[16]

Though we believe the FCC has some regulatory leeway, the potential reach of the present exercise concerns us. Without belaboring Congressional intent, "Title II" (and all its recent amendments) was designed primarily for a different world. Congress purposely created a bubble in which information services / broadband Internet access could thrive and proliferate outside of the old POTs / common carrier paradigm. It has worked amazingly.

Now, however, the FCC appears intent on changing this. If, after consideration of this record, the FCC settles on detailed Net Neutrality / "open access" mandates for all broadband Internet access providers, it will have stepped back to the monopoly past to guide future growth of the open Internet. Not only does this seem inappropriate from a statutory point of view, it may also violate the U.S. Constitutional rights of broadband Internet access providers, imposing on them who must be able to "speak" on their private property (in violation of the First Amendment), and doing so without just compensation (in violation of the 5th Amendment).[17]

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[15] Hazlett, Thomas W. and Caliskan, Anil, Natural Experiments in U.S. Broadband Regulation (February 1, 2008). George Mason Law & Economics Research Paper No. 08-04, available at http://ssrn.com/abstract=1093393.

[16] *See, e.g.*, 47 USC § 251.

[17] Through para. 106 of the *NPRM*, the Commission appears to be imposing broad content regulation without a compelling governmental interest, while at the same time proposing to prevent compensation for access to ISP end-users, essentially outlawing "two-sided" business models (among others) for ISPs.

Taken as a whole, this presents a real conundrum, which justifies regulatory caution. All sides of the industry ask for regulatory certainty so that they may better innovate for consumers. Clear rules help immensely. But in light of the murky organic authority, and questionable Constitutional license, it remains unclear how the FCC, even according itself with APA practice, can proceed here. With all due deference, we do not believe the FCC can create authority beyond the four corners of the Communications Act, especially in light of Congress' design.

III. An Alternative

As illustrated above, our policy position generally favors less regulation to promote the growth of broadband infrastructure and resulting innovation. That noted, some in our membership (such as content providers; hardware, software and device vendors / manufacturers; application and other service providers) feel that access to the broadband Internet calls for further assurances.

Bearing these sensitivities in mind, CompTIA's Public Policy Committee (which is comprised of IT vendors, ISPs / telecoms, IT training companies, and VARs) recently modified its policy to take into effect these concerns.

For the past four years, the core of our "Internet connectivity" policy position has stated:

> *Connectivity is essential to the smooth functioning of the information technology sector. Consequently, CompTIA supports government policies that stimulate telecommunications competition-driven solutions, innovation and investment. Traditional telecommunications regulation should not be applied without careful consideration of whether regulation is required. Adding further caution, telecommunications regulations can act as a back-door to regulating Internet and/or other advanced communications offerings – an environment which has thrived*

through the general absence of direct regulation. To this end, we urge policymakers to look first to the evolution of technology, marketplace guidance, consumer education, industry best practices, present enforcement tools and the presence consumer harm before embarking on any new telecom-oriented regulations.

On December 18, 2009, largely in response to this NPRM, CompTIA's Public Policy Committee unanimously added the following "codicil":

CompTIA supports the ability for broadband Internet access service consumers, including businesses and government users, to connect and have access to their choice of legal Internet content, applications and devices, while also recognizing the needs of Internet service providers in a competitive market to manage the security and functionality of their networks. Consumers should be permitted to attach any non-harmful devices they choose to their broadband connection.

This "codicil" reflects many of the points within the FCC's present Net Neutrality principles – i.e., non-harmful access to content, applications and devices by end-users. It was the belief of the CompTIA Public Policy Committee that these minimum standards will keep the Internet open and vibrant, a constantly evolving tool for societal growth and prosperity for generations to come.

As this work pertains to the NPRM, CompTIA's Public Policy Committee remains concerned that detailed rules – akin to telephone "open access" regulation – could work to penalize advances in the network itself, making, in particular, facilities-based ISPs more risk averse when rolling out core infrastructure, such as fiber to homes, advanced wireless capabilities or other related innovation.[18]

[18] *See, e.g., Ex Parte Submission of the United States Department of Justice*, *In the matter of Economic Issues in Broadband Competition, A National Broadband Plan for Our Future,* pg. 28 (January 4, 2010), (cont'd)…

Thus, should the Commission have the requisite organic authority, and the agency determines that the *public interest* deems some regulation necessary, application of the FCC's "Net Neutrality" principles, on a case-by-case basis, may be desirable to provide greater regulatory certainty, while also protecting the open and vibrant nature of the Internet.

We add further that in policing Internet "openness" on a case-by-case basis, we urge the Commission to focus on "unreasonable" or anticompetitive discrimination, which affects consumer choice. We believe that this is especially important as it relates to the Commission's newly proposed "non-discrimination" principle, which, strictly applied, could ban or delay critical infrastructure investment. According to one of our Committee members, by focusing in this manner, "*the Commission can enable innovation to occur at all levels of the Internet but still maintain the ability to respond [to]…conduct that materially harms consumers*."[19]

Finally, we respectfully request that any such rules allow for a maximum of flexibility as to service and business model experimentation, especially as these rules affect enterprises providing core, facilities-based technologies – i.e., landline, satellite, BPL, and wireless (among other known technologies) – to third-parties. Without core network innovation, edge innovation cannot occur. We feel that added flexibility in this regard will help induce facilities-based providers to roll out more needed infrastructure, thus boosting opportunities for consumers to access competitive broadband options, as well as new edge innovation.

(cont'd)…noting in comments before the FCC on its pending National Broadband Plan: "*Although enacting some form of regulation to prevent certain providers from exercising monopoly power may be tempting with regard to [areas with a single, or even two broadband providers]…care must be taken to avoid stifling the infrastructure investments needed to expand broadband access. In particular, price regulation would be appropriate only where necessary to protect consumers from the exercise of monopoly power and where such regulation would not stifle incentives to invest in infrastructure deployment."*

[19] Letter from James W. Cicconi, Senior VP AT&T Public Policy, to FCC Chairman Julius Genachowski (December 15, 2009).

IV. Conclusion

As recently noted by Wall Street Journal technology columnist, L. Gordon Crovitz, "*The more we learn about how innovation happens, the less straight the lines of advance look.*"[20] Rules, though well-meaning in design, often fail to keep pace with, or can even frustrate, the non-linear development of technology and innovation. Thus, though CompTIA recognizes the immense importance of preserving the open and vibrant nature of the Internet, we urge the Commission to move carefully. To this end, we reiterate our steadfast belief that the marketplace works to the benefit of broadband consumers, infrastructure providers and edge innovators. However, if after careful consideration the Commission feels rules are needed, we urge they be: 1. as minimal as possible; 2. flexible enough to promote core and other innovation; 3. exercised on a case-by-case basis, and 4. focused on "unreasonable" or anticompetitive discrimination, which harms consumers.

Respectfully submitted,

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[20] L. Gordon Crovitz, *Technology Predictions Are Mostly Bunk*, Wall Street Journal (December 27, 2009), http://online.wsj.com/article/SB10001424052748704039704574616401913653862.html.